UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

MIKE-SELL'S POTATO CHIP COMPANY

and Case 09-CA-184215

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS (IBT), GENERAL TRUCK DRIVERS,
WAREHOUSEMEN, HELPERS, TEAMSTERS
LOCAL UNION NO. 957

COUNSEL FOR THE GENERAL COUNSEL'S SUPPLEMENTAL BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION:

This case is before Administrative Law Judge Andrew S. Gollin upon the Board's Order remanding this matter for further consideration. A Supplemental Hearing was held on November 19, 2018. The record evidence supports the General Counsel's legal argument.

II. STATEMENT OF THE CASE:

The original charge in the above-captioned case was filed on September 14, 2016 (G.C. Ex. 1(a)) [1]/and amended on December 9, 2016. (G.C. Ex. 1 (c)). On May 31, 2017, the Charging Party filed a second amended charge. (G.C. Ex. 2)

On May 31, June 1 and 2, 2017, an unfair labor practice hearing was held in Cincinnati, Ohio before Administrative Law Judge Andrew S. Gollin. On July 25, 2017, Judge Gollin issued his decision in this matter finding that Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Charging Party Union notice and an opportunity to bargain about its

[1]/ References to the original transcript will be designated as (Tr. ____) references to the supplemental transcript as (STR. ____); references to General Counsel's original Exhibits will be designated as (G.C. Ex. ____); references to General Counsel's Supplemental Exhibits will be designated as (G.C. Supp. Ex. ____); references to Charging Party's original Exhibits will be designated as (C.P. Ex. ____); references to Charging Party's Supplemental Exhibits will be designated as (C.P. S Ex. ____); references to Respondent's Exhibits will be designated as (Resp. Ex. ____); references to original Joint Exhibits will be designated as (Jt. Ex. ____); references to the Administrative Law Judge's Decision will be designated as (ALJD, p. ___);

decision to sell four union employee operated routes to independent distributors and by failing to provide the Charging Party Union with requested information related to the sale of the routes.

On December 17, 2017, Respondent filed Exceptions to Judge Gollin's decision. General Counsel and the Charging Party filed separate answering briefs to the Respondent's Exceptions. On December 17, 2017, the Board issued the decision in *Raytheon Network Centric System*, 365 NLRB No. 161. On August 2, 2018, the Board remanded this proceeding to Judge Gollin for further consideration.

On August 23, 2018, Respondent moved to reopen the record in this matter. Both General Counsel and the Charging Party filed Memorandum in Opposition to Respondent's Motion. On October 1, 2018, Judge Gollin issued an order scheduling a supplemental hearing which was held on November 19, 2018.

III. <u>ISSUE</u>:

Whether the sale of Respondent's Routes #102, #104, #122, and #131 was made in accordance with an established past practice thus relieving Respondent of its obligation to bargain with the Union or to give notice to the Union of its actions.

IV. <u>FACTS</u>:

Respondent Mike-Sell's Potato Chip Company is engaged in the production and distribution of snack foods. (Tr. 70, 186, 232) Respondent is a privately held corporation. (Tr. 232) Respondent produces a variety of potato chips at its Dayton, Ohio facility and corn extruded products at its Indianapolis, Indiana facility, (Tr.23) using two methods of distribution - direct store delivery (DSD) and warehouse/direct sales. (Tr. 233) Respondent and the Union have been signatory to successive collective-bargaining agreements since at least 1982. (Tr. 70, 146, 186) The most recent agreement expired by its terms on November 17, 2012. (Jt. Ex. 1)

Throughout the 1980's, Respondent operated 9 small warehouses/distribution centers or bins located in Columbus, Cincinnati, Greenville, Hammersville, Portsmouth, New Paris, Sabina, Springfield, and Versailles, Ohio. (STr. 36) The primary warehouse/distribution center and production facility has always been in Dayton, Ohio and is known as the Dayton Distribution Center/warehouse where all potato chip products have always been transported from its Dayton facility, by its Dayton over-the-road drivers, to the various small outlying warehouses/distribution centers or bins throughout Ohio, and then the bargaining unit drivers loaded the products on their trucks and delivered the product on their assigned routes. (STr. 66, 107)

As early as 1998 or 1999, Respondent began randomly selling some of its routes driven by bargaining unit drivers to independent contractors. (STr. 44-45) In 2002, Respondent operated 7 warehouses/distribution centers including the Dayton Distribution Center. (STr. 121) Since that time Respondent closed all of its smaller outlying distribution centers/ warehouses/ bins (STr. 123) Currently, Respondent only distributes product from the Dayton Distribution Center/Warehouse using bargaining unit drivers or independent contractors. (STr. 107) About October 2002, Respondent sold its Portsmouth warehouse and negotiated a severance package with the four affected bargaining unit drivers. (STr. 55, 104, 108; Resp. Ex. 47) These drivers were also eligible to bump/bid into other locations, after receiving their severance packages, but all of them chose not to. (STr. 72). There was no adverse effect on these employees. Similarly, when Respondent closed its Hammersville location, it sold one route (territory) and the other Hammersville route and driver was reassigned to the Cincinnati warehouse. (STr. 75) This closing had no adverse effect on the involved bargaining unit employees. Respondent closed its Hammersville (bin) location because it was not profitable to operate the two Hammersville routes from that location. (STr. 92)

Throughout Respondent's sale and/or abandonment of certain routes many drivers were not adversely affected by displacement because of natural attrition such as retirement and resignations. (STr. 126) Moreover, throughout these sporadic sell-offs, the bargaining unit drivers always had bumping /bidding rights. (STr. 126; Resp. Ex 3)

Similarly, in 2006, Respondent sold its Muncie, Indiana route which was serviced out of the Greenville warehouse/distribution center. (STr. 130-131). Again this sale did not have an adverse impact on any driver. No drivers were displaced as a result of the sale of the Muncie route. (STr. 133) The testimony reflects that the Muncie route became available when the bargaining unit driver resigned her employment. (STr. 133) Respondent posted the route for bidding, but no one responded. (STr. 134) Thereafter, Respondent sold the Muncie route to an independent contractor (STr. 131-132; Resp. Ex 48). Respondent did not bargain with the Union over the decision to sell the Muncie route or over the effects of the decision to sell the route. (STr. 135)

Some three years later, in 2009, Respondent sold its Mansfield, Ohio route to an independent contractor. (STr. 137) Again Respondent failed to bargain with the Union over its decision to sell the Mansfield route or over the effects of its decision to sell that route. (STr. 138)

In late 2009, Respondent sold its Newark/ Granville/ Zanesville routes as well as its Lancaster/ Hocking Hills/Athens routes. (STr. 138; Resp. Ex. 49) Respondent failed to bargain with the Union over its decision to sell these routes or the effects of its decision to sell these routes. (STr. 141) The initial independent contractor that purchased these routes returned them to Respondent either in late 2009 or early 2010. (Tr. 141-142) When the independent contractor returned the routes, Respondent retained one and assigned one of its swing drivers, Ronnie Paige to that route. (STr. 142) However, Respondent re-sold the Lancaster/ Hocking Hills/ Athens route in June 2011. (STr. 142) It again failed to bargain with the Union over the decision to re-sell these routes or the effects of its decision to re-sell those routes. (STr. 143) When the independent contractor returned the Mansfield route, Respondent abandoned that route/ area. (STr. 145) There was no adverse effect on any bargaining unit member as a result of the abandonment of the Mansfield route since it had not been operated by a unit member. (STr. 146)

Although the Newark/Granville/Zanesville route was brought back in-house, it was again sold in or about August 2011. (STr. 147) Respondent failed to bargain with the Union over the decision to sell those routes. (STr. 150)

Then in November 2011, Respondent sold its Marion, Ohio route. (Tr.259; STr. 151-152) As a result of this sale and the adverse impact that it had on bargaining unit member Angie Watson, the Union filed a grievance over this sale. (Tr. 259; STr. 154; Resp. Ex. 2)

In or about 2012 and 2013, Respondent sold some of its outlying routes to subcontractors/independent contractors. (Tr. 137, 302-304, 307-308) These routes involved the transporting of Respondent's products to outlying locations – either smaller warehouses or storage units from its Dayton, Ohio production facility and warehouse (Dayton Distribution Center/Warehouse) using its over-the-road drivers (Tr. 691, 1008) where the products were then loaded and distributed by its employees. (Tr. 1008) In November 2011, the Union protested the sale of an outlying route in Marion, Ohio assigned to Angie Watson. (Tr. 259; Resp. Ex. 2) The matter was arbitrated and the Union's grievance was denied. (Resp. Ex. 2) Arbitrator Michael Paolucci (herein called Paolucci) found that the arbitration case involved the transfer of all of the expense of the route sales driver's route and any potential revenue to a third party on a route that was unprofitable and the loss from the route was ongoing. The arbitrator classified this as a losing proposition. (Resp. Ex. 2, p. 18) Arguably, the arbitrator incorrectly held that the independent contractor chose its customers. Thereafter, Respondent continued to sell similar distant, remote and unprofitable routes. (Tr. 302-304, 307-308) The Union did not protest these sales because of the holding in the Paolucci award.

In April 2016, [2] by letter, Respondent announced that in accordance with its' rights as recognized by Arbitrator Paolucci, it was going to sell three (3) routes. (Tr. 73, 147; Jt. Exs. 2 and 3) The letter further stated if Respondent ultimately decided to sell one or more of these three routes, that it would provide the Union with timely notice of its decision and honor its obligation to bargain over the effects of the route eliminations. These were local routes that were serviced directly from the Dayton, Ohio production facility and warehouse and which were void of the transportation and storage costs involved in all of the preceding sales. (Tr. 718) The Union immediately filed a grievance over the announced sale, which was denied. (Tr. 74, 75-76, 80, 148; Jt. Ex. 4)

On July 11, Respondent notified the Union, in writing, that in accordance with its' rights as recognized by Arbitrator Paolucci, it would be selling Route #102, Xenia territory. About July 24, Respondent sold Route #102 to an independent contractor.

About August 29, Respondent notified the Union, in writing, that in accordance with its' rights as recognized by Arbitrator Paolucci it would be eliminating two positions through the sale of Route #104 and Route #122 on September 4, and the displaced employees will have an opportunity to rebid.

Respondent sold off these two routes (#104 and #122) to employee Lisa Krupp. (Tr. 83, 189; Jt. Ex. 12) About August 29, the Union grieved the sale of these routes. (Tr. 83-84; Jt. Ex. 7) This grievance was denied through the first three steps of a four-step grievance procedure. (Tr. 83-84; Jt. Ex. 7; G.C. Exs. 3 and 4) Finally, about September 12, Respondent again notified the Union, in writing that in accordance with its rights as recognized by Arbitrator Paolucci, it would be selling Route #131 effective September 17. (Tr. 90; Jt. Ex. 10) The Union grieved this sale too. (Tr. 90-91; Jt. Ex. 11) This grievance was also denied through the first

[2] / All dates referred to herein are in 2016 unless otherwise noted.

three steps of the grievance procedure. (G.C. Exs. 4 and 5) None of these grievances were arbitrated because the collective-bargaining agreement expired in 2012. (Tr. 80)

About August 31, Allen Weeks, the Union's recording secretary and business agent, requested, in writing, to meet and bargain with Respondent about the decision to sell Route #104 and #122. (Tr. 89, 156-157; Jt. Ex. 8) In his letter, Weeks states that after reviewing the Paolucci decision, that the Union feels that the arbitration decision does not give Respondent the right to sell the two routes in question. Weeks points out that there were a number of factors that Paolucci relied on in issuing his decision which are not present with respect to these routes – unprofitability, distance from the distribution center which increased the cost of providing product to the route; and similar actions had occurred in the past. Weeks contends that the sale involving Route #104 and #122 do not have the same characteristics as the route involved in the Paolucci decision.

In this letter, the Union also requested Respondent provide it with:

1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 2, 2014 through August 1, 2016 so a comparison can be made as to the profitability of all of the routes to Route #104 and Route #122.

2. A copy of the agreement between Mike-Sell's and the entity to whom Route #104 and Route #122 is scheduled to be sold.

3. A description of how Mike-Sell's product is to be received by the entity to whom Route #104 and Route #122 is scheduled to be sold.

4. A copy of all correspondence, including electronic correspondence, between Mike-Sell's and the entity to whom Route #104 and Route #122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016. (Jt. Ex. 8)

The Union also asked Respondent to delay the sale until it had an opportunity to review the requested information and until the parties could meet and bargain about the decision.

Respondent, admittedly, refused to bargain about its decision to sell its routes and also, admittedly, refused to provide the requested information. (Tr. 89, 157; G.C. Exs. 1(g) and (h)) On September 12, Respondent replied by refusing to meet and bargain about its decision to sell

Route #104 and #122 and refusing to provide the requested information designed specifically for the purpose of engaging in decisional bargaining. Respondent also stated it had chosen a different manner of operating its business. (Jt. Ex. 9)

V. <u>LEGAL ANALYSIS</u>:

It is well settled that wages, hours, benefits and other terms and conditions of work are mandatory subjects of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 279 U.S. 203 (1965); *NLRB v. Katz*, 369 US 736 (1962). It is also settled that the decision to relocate or subcontract unit work that is not accompanied by a basic change in an employer's operation is a mandatory subject of bargaining unless the employer can establish that the work performed at the new location varies significantly from the work performed at the prior location; the work performed at the former location is discontinued entirely and not moved to the new location; or, the employer's decision involved a change in the enterprise's scope and direction. *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991) enfd. sub nom, *Food and Commercial Workers Local 150-A v. NLRB*, F.3d 24 (D.C. Cir. 1993)

Respondent would contend that the sale of each route is akin to a decision as to whether to be in business or not. Counsel for the General Counsel submits that the sale of these routes to independent contractors is nothing more than substituting one employee or group of employees for another. In fact, one of the purchasers (Krupp) was a member of the bargaining unit up until the time of her September 4th purchase. In *Fibreboard*, supra, the Supreme Court held that an employer's subcontracting of bargaining unit work, in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining. *Id*. at 213. The Court went on to find that, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment by the employer and had not altered the employer's basic operation, requiring the employer to bargain about the decision "would not significantly abridge [the employer's] freedom to manage its business." *Id*. The Court further found that because the decision turned on labor costs, it was "peculiarly suitable for resolution with the collective bargaining framework." *Id*. at 213-214.

Counsel for the General Counsel submits that the instant case is analogous to *Fibreboard*. Here, Respondent sold routes which were serviced out of the Dayton Distribution Center/Warehouse to independent contractors. Admittedly, these independent contractors performed the same work as Respondent's route sales drivers. They load their trucks with Respondent's products from the Dayton Distribution Center/Warehouse. The independent contractors then deliver Respondent's products to the same customers that had previously been serviced by Respondent's route sales drivers. (Tr. 993-994, 998) The independent contractors as well as the route sales drivers, stock the product on the customers' shelves or other display bins. Both the independent contractor and the route sales drivers input orders and sales information into a hand held computer that delivers the information to Respondent. (Tr. 71, 80, 187, 996, 1013) Some of the independent contractors' customers continue to maintain their accounts for payment with Respondent. (Tr. 1053) The independent contractors even transport their products in former vehicles that were owned by Respondent. (Tr. 958, 995) In fact, while employed by Respondent, Krupp had operated the same vehicle she purchased from Respondent. (Tr. 995)

Respondent argues that its actions with respect to the sale of Routes #102, #104, #122 and #131 were consistent with its past practice of selling routes and thus did not change the status quo, thereby relieving it of any obligation to bargain with the Union over the decision to sell the routes. Respondent relies on Board precedent holding that a unilateral change made pursuant to a long standing practice is essentially a continuation of the status quo and therefore not a violation of the Act. *Courier Journal*, *342* NLRB 1093 (2004)

Respondent argues that the evidence adduced at the initial merits hearing and the supplemental hearing demonstrates that over the years it sold off routes/territories without protest from the Union. Counsel for the General Counsel submits that the evidence does not establish that Respondent's practice of selling routes occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *First Energy Generation Corp.*, 358 NLRB 842 (2012) citing *Caterpillar, Inc.*, 355 NLRB 521 (2010).

When Respondent closed its Hammersville warehouse/distribution center and sold one of two routes (territory) to an independent contractor and re-assigned the second route and driver to the Cincinnati warehouse, the Union did not object to this sale (STr. 44-45, 48, 50, 75) In short, no employee was displaced as a result of this sale; nor was there any visible evidence of any adverse impact on the bargaining unit. However, in about October 2002, when Respondent closed its Portsmouth warehouse and sold the Portsmouth routes, four drivers were displaced and the Union's objection to the sale resulted in each driver receiving a severance package in addition to their contractually guaranteed bumping/bidding rights. (STr. 50-56, 122-123, 128, 130)

The evidence reflects that Respondent sold its Muncie, Indiana route, another outlying, distant and remote route, to an independent contractor in 2006 and did so after the bargaining unit driver resigned. No other bargaining unit person bid on the open route; and, the Union did not object to the sale of that route. Some three years later, about 2009, when Respondent sold its Mansfield route to an independent contractor and did not bargain about it, the Union did not object to the sale. However, as was the case noted above, no evidence was presented that the sale resulted in any discernible adverse impact on any Union driver. The same holds true for Respondent's sale of its outlying routes/territories in the Newark/Granville/Zanesville area and the Lancaster/Hocking Hills/Athens area in late 2009 and in June 2011 after the independent contractor/purchaser returned the routes to Respondent. In each of these instances in which Respondent failed to bargain with the Union about the sale, and the Union did not protest the sale, no evidence was presented that the sale in question resulted in any obvious adverse effect on the bargaining unit drivers.

However, in November 2011, when Respondent sold its Marion route, the Union objected because of the adverse effect the sale had on the involved bargaining unit driver. A grievance was filed and arbitrated. (Tr. 259, STr. 154: Resp. Ex. 2) The grievance was denied.

Thereafter, Respondent occasionally sold and/or closed its outlying, distant and remote warehouses/distribution centers. The Union did not object and there was no apparent adverse impact on any of the bargaining unit employees. (STr. 160-169)

On April 27, 2016, Respondent announced, by letter, that it was going to sell three routes in accordance with Arbitrator's Paolucci award. (Jt. Exs. 2 and 3)These routes were local routes all serviced out of the Dayton Distribution Center/ Warehouse.

Counsel for the General Counsel submits that clearly these announced sales are different than the ones depicted above involving outlying, distant, and remote routes. Counsel for the General Counsel asserts that the Respondent has not established that these unilateral, unbargained sales occurred with any regularity or frequency. *First Energy Generation Corp.*, 358 NLRB 842 (2012)

Even assuming that the pre- 2016 sales were sufficiently similar among themselves to constitute a "practice," the sale of Routes # 102, #104, #122, and #131 was a material departure from that past practice and was thus a mandatory subject of bargaining. See: *Caterpilliar, Inc.*, 355 NLRB 521 (2010)

The instant case is distinguishable from *Courier Journal*, 342 NLRB 1093 (2004), where the Employer had made regular, unilateral changes to its health insurance costs and benefits for 10 years. The Board found that the significant aspect of that case was the union acquiesced in a past practice under which premiums and benefits were tied to those of non-unit employees.

Counsel for the General Counsel submits that in the case at bar that not only was there no established past practice of selling routes, there was no evidence presented that the Union acquiesced in these sales, particularly where such adversely impacted bargaining unit employees. The testimony from Respondent's own witnesses establishes that when the stewards were advised of these sales, that Respondent had already decided to sell the routes/territory or the warehouses. Respondent, in essence, presented the Union with a fait accompli regarding the various sales and did not afford the Union a meaningful opportunity to bargain. Id. at 1100. Moreover, at the initial hearing, Phil Kazer, Executive Vice President of Sales and Marketing, admitted that there were several instances where Respondent did not send a letter similar to the April 27, 2016 letter (Jt. Ex. 3) it sent the Union regarding the sales of Routes #102, #104, #122, and #131. (Tr. 751, 762) In fact, Mark Plummer, zone manager, testified at the supplemental hearing that the notices of sale that he provided stewards were all oral. (STr. 134, 153, 169, 218)

Between October 2002 and December 15, 2015, Respondent sold approximately 12 routes/territories. (Resp. Exs. 5, 6, 7, 9 and 16) Counsel for the General Counsel therefore submits that the sporadic sale of these twelve routes/territories is not regular or consistent nor would employees expect the "practice" to continue. See: *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017); *Eugene Iovine, Inc.,* 328 NLRB 294 (1999). Kazer testified at the initial merits hearing that Respondent's decision to sell were based on what routes the independent contractors wanted to purchase. Respondent, however, presented no evidence at the initial hearing or the supplemental hearing there was any consistent, established practice in determining what routes to sale or when to sale.

Counsel for the General Counsel offers that the 2016 sales of Routes #102, #104, #122, and #131 were materially and substantially different than any of Respondent's preceding sales, in that these sales involved local routes which were all serviced from the Dayton Distribution Center/Warehouse. These routes did not involve the costs of transporting Respondent's product, via over-the-road drivers to outlying and distant areas, or the cost of storage at any outlying, distant and remote warehouse/distribution center. Counsel for the General Counsel asserts that Respondent's 2016 announced and implemented sales constituted a substantial change from its past sales. The 2016 sales are neither similar in kind or degree to what Respondent did in the past.

Counsel for the General Counsel submits that based on current Board law, the 2016 announced and implemented sales were not made in accordance with any past practice and constituted a mandatory subject of bargaining under *Katz, Fibreboard* and their progeny.

VI. CONCLUSION:

Based on the foregoing, and the record as a whole, Counsel for the General Counsel respectfully urges the Administrative Law Judge to find that Respondent violated Section 8(a)(1) and (5) of the Act by selling its Routes #102, #104, #122, and #131 without bargaining with the Union. Counsel for the General Counsel requests an order requiring Respondent to rescind the sale of these routes, pay affected employees for any loss of wages and other benefits lost because of the sale of these routes without bargaining with the Union.

Dated: December 19, 2018

Respectfully submitted,

/s/ Linda B. Finch

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CERTIFICATE OF SERVICE

December 19, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Supplemental Brief to the Administrative Law Judge on the following parties by electronic mail:

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